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Supreme Court of the United States

[redacted] Term, 1955

[redacted]

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a/k/a JOHN HANCOCK [redacted]

Petitioner,

v.

WILLIAM S. [redacted]

Respondent.

PETITION FOR WRIT OF CERTIORARI

BRIEF IN SUPPORT THEREOF

[redacted]

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Supreme Court of the United States.

OCTOBER TERM, 1945.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Petitioners,

v.

WILLIAM E. HURLEY (SUBSTITUTED FOR MERRITT THOMPSON, COLLECTOR OF TAXES),

Respondent.

PETITION FOR WRIT OF CERTIORARI.

Summary of Matters Involved.

This petition seeks a review of a decision of the Circuit Court of Appeals for the First Circuit affirming the judgment of the District Court for the District of Massachusetts entered January 31, 1945 (Record, pp. 6, 7), upon the motion of the Collector of the City of Boston, respondent herein, for summary judgment against John Hancock Mutual Life Insurance Company and Fidelity and Deposit Company of Maryland, petitioners herein, principal and surety, respectively, on a supersedeas bond filed June 30, 1944.

On June 22, 1944, the District Court ordered that the Clerk pay forthwith to the respondent from part of the money deposited in the registry of the Court on August 21, 1943, for or on account of the just compensation to be awarded for the condemnation of the interest in land taken, the sum of $19,998.09, "together with interest at the rate of $2.12 per day from May 15, 1944, to the date of payment" (Record 4030, p. 19). The amount of said deposit was $40,000 (Record 4030, p. 14).

On June 30, 1944, the petitioner John Hancock Mutual Life Insurance Company appealed from said order (Record 4030, p. 30) and filed with the Clerk a supersedeas bond in the sum of $1000 as principal with the petitioner Fidelity and Deposit Company of Maryland as surety (Record, p. 2), and subsequently the appeal was dismissed with costs of $20 to the appellee. After issuance of the mandate and on December 29, 1944, the Clerk paid to the respondent the sum of $20,095.61, being said sum of $19,998.09 specified in said order June 22, 1944, together with interest at the rate of $2.12 per day from May 15, 1944, to June 30, 1944, only when said supersedeas bond was filed (Record, pp. 5 and 10) instead of to date of payment.

On January 4, 1945, the respondent filed motion for summary judgment against the petitioners, principal and surety, respectively, on the aforesaid bond (Record, p. 3). This motion was heard upon oral arguments of counsel and on January 31, 1945, judgment against the petitioners in the amount of $604.39 was entered, computed as set forth in petitioners' narrative statement, being interest at the rate of 6% per annum on said sum of $20,095.61 from June 30, 1944 (when the supersedeas bond was filed), to January 31, 1945 (the date of the summary judgment), together with the costs of $20 taxed by the Circuit Court of Appeals against the petitioners, pursuant to its mandate dismissing said appeal (Record, p. 10). The District Court denied the

petitioners' motion for leave to deposit with the Court said sum of $20 admittedly due to the respondent. The petitioners appealed from the judgment against them entered January 31, 1945, excepting that part thereof with respect to said $20.

The petitioners by their appeal to the Circuit Court of Appeals challenged the judgment of the District Court on the grounds that it was based upon an improper construction of the supersedeas bond and of Federal Rules of Civil Procedure, Rule 73 (d) and (e), an improper construction of the order of the District Court dated June 22, 1944, and an improper interpretation of Federal Rules of Civil Procedure, Rule 73 (f), and, if so construed, said rules were invalid in that they violated the Seventh Amendment of the Constitution.

The jurisdiction of the Supreme Court of the United States is invoked under the provisions of the United States Code, 1940 Edition, Title 28, section 347.

The Questions Presented.

(1) Where the Clerk of the Court is ordered to pay forthwith to a claimant from the moneys deposited in the Registry of the Court for the condemnation of an interest in land taken in condemnation proceedings a certain sum together with interest at the rate of $2.12 per day to the date of payment, shall such order be construed to mean interest at the rate of $2.12 per day upon said sum to the date of the filing of a supersedeas bond?

(2) Where the mandate of the Circuit Court of Appeals affirming the judgment of the District Court did not give the District Court power to change the judgment entered originally by the District Court against a fund in custody of the District Court, by adding interest other than the

interest ordered originally, may the District Court add or detract from the judgment affirmed by the Circuit Court of Appeals?

(3) Shall Federal Rules of Civil Procedure, Rule 73 (d), (e) and (f), be construed to permit making a principal on a supersedeas bond a party defendant in proceedings for summary judgment?

(4) Do the Federal Rules of Civil Procedure apply, except with respect to appeals, to condemnation proceedings?

(5) If said rules are so construed, do they violate the Seventh Amendment of the Constitution of the United States?

Reasons Relied on for the Allowance of the Writ.

While there have been numerous decisions of the Supreme Court of the United States respecting liability of principal and surety on supersedeas bonds, this is the first occasion for the application of Federal Rules of Civil Procedure to a supersedeas bond in condemnation proceedings. If Rule 73 (d), (e) and (f) are to be construed to permit the entering of a summary judgment against the principal and surety on a supersedeas bond, the decision of the Circuit Court of Appeals would appear to be in conflict with the decisions of this Court in the following cases:

Jerome v. *McCarter,* 21 Wall. 17;
Supervisors v. *Kennicott,* 103 U.S. 554—

with the decision of the Circuit Court of Appeals for the First Circuit in—

Rosenstein v. *Tarr,* 51 Fed. 368 (D.C. Mass. 1892); affirmed, *per curiam,* 53 Fed. 112 (C.C.A. 1st, 1892);
Pike v. *Gregory,* 118 Fed. 128 (C.C.A. 1st, 1902)—

and with the decision of the Circuit Court of Appeals for the Third Circuit in—

> *Sprukes* v. *United States Fidelity & Guaranty Co.*, 138 F. (2d) 812 (C.C.A. 3d, 1943), with which the Circuit Court of Appeals in the case sought to be reviewed by this petition expressly recognized its decision to be in conflict.

The Circuit Court of Appeals has improperly applied the decision of this Court in—

> *Jerome* v. *McCarter*, 21 Wall. 17, and
> *Supervisors* v. *Kennicott*, 103 U.S. 554—

which improper application should be corrected.

Since supersedeas bonds are common in appeals, it is desirable that it be finally determined whether sureties thereon are to be held liable, not only for judgments against their principals, but also for summary judgments against their principals.

In the interest of brevity, your petitioners do not at this time set forth all the points which they urged on the argument of the appeal of this cause to the Circuit Court of Appeals, but, in order to comply with the rule of this Court, requiring of all issues upon which decision is requested to be presented in the petition for writ of certiorari, the petitioners here refer to and incorporate in this petition all of the matters presented in the "Statement of the Points" (Record, p. 9) with the same force and effect as if herein set out in full.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the First Circuit commanding said Court to certify and send to this Court for review and

determination on a day certain to be therein named a transcript of the record and proceedings therein and that the judgment of the Circuit Court of Appeals for the First Circuit and the District Court for the District of Massachusetts be reversed by this Honorable Court and your petitioners have such other and further relief as to this Honorable Court may seem just and proper.

JOHN HANCOCK MUTUAL LIFE
INSURANCE COMPANY,
By its Attorney,
G. K. RICHARDSON.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,
By its Attorney,
G. K. RICHARDSON.